Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

ABU BENIN,

Petitioner,

v.

HOME SAVINGS OF AMERICA, FSB, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX A -- Memorandum from the United States Court of Appeals for the Ninth Circuit in the case of Abu Benin v. Home Savings of American FSB, et al. ,Case No. 98-55952, filed March 23, 1999.

SUPPLEMENTAL APPENDIX B -- Memorandum and Order from the United States District Court Central District of California in the case of Abu Benin v. Coast Federal Bank, et al. ,Case No. CV 97-6763-HLH, filed January 12, 1997.

Respectfully submitted,

Abu Benin

Date: October 25, 1999

SUPPLEMENTAL APPENDIX A

FILED
MAR 23 1999
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABU BENIN, Plaintiff-Appellant, v. HOME SAVINGS OF AMERICA, FSB; H.F. AHMANSON & CO.; GEOFFREY G. OLSEN, a Member of the California State Bar, an Individual; MCKINLEY & CAPELOTO, Business form unknown; J. SHELDON CAPELOTO, a Member of the California State Bar and an Individual; ELIZABETH A. LOSSING, a Member of the California State Bar and an Individual; PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,	No. 98-55952 D.C. No. CV-97-6763-HLH MEMORANDUM [1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Business Entity Form Unknown; PRUDENTIAL INSURANCE COMPANY OF NORTH AMERICA, a Holding Company; BERGER, KAHN, SHAFTON, MOSS, FIGLER, SIMON & GLADSTONE, A Professional Corporation; PATRICK E. NAUGHTON, a Member of the California State Bar and an Individual; JULIE R. BEATON, a Member of the California State Bar and an Individual; DAVID DOI, Judge, a Municipal Court Judge, a Member of the California State Bar and an Individual; SUSAN ISACOFF, Judge, a Municipal Court Judge, a Member of the California State Bar and an Individual; MAXWELL JOUANICOT, an Individual; DANIELLE D. CYR, an Individual; DOES, 1 through 50 inclusive,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted March 15, 1999[2]

Before: GOODWIN, KOZINSKI, and LEAVY, Circuit Judges.

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[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a).

Abu Benin appeals pro se the district court's dismissal of his action alleging that defendants violated his constitutional rights in an underlying state court unlawful detainer action instituted against Benin. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1413 (9th Cir. 1995), and may affirm on any basis supported by the record, *see Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995). We affirm.

The district court properly dismissed Benin's amended complaint because his claims against the state court judges are barred by judicial immunity, *see Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996), and his § 1983 claims fail because the remaining defendants are not state actors, *see Fred Meyer, Inc.*, 67 F.3d at 1413-15. Benin also failed to allege sufficient facts to state cognizable claims under 42 U.S.C. §§ 1981, 1985, 1986.[3]

Benin's pending motions are denied.

AFFIRMED.

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[3] Although the district court afforded Benin an opportunity to amend these claims, he elected not to do so. Consequently, the case was dismissed for failure to prosecute.

SUPPLEMENTAL APPENDIX B

FILED
CLERK, U.S. DISTRICT COURT
JAN 12 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ABU BENIN, Plaintiff, v. COAST FEDERAL BANK, etc, et al., Defendants.	Case No. CV 97-6763-HLH MEMORANDUM AND ORDER

For the reasons discussed below, Plaintiff's First Amended Complaint is dismissed with leave to amend. If Plaintiff still wishes to pursue this action, he is granted thirty (30) days from the date of this Memorandum and Order within which to file a Third Amended

Complaint, attempting to cure the defects in the First Amended Complaint described herein.[1/] The Third Amended Complaint shall be complete in itself. It shall not refer in any manner to prior Complaints. Failure to file timely a Third Amended Complaint may result in a recommendation that this action be dismissed for failure to prosecute.

PROCEEDINGS

Plaintiff filed a Complaint on September 10, 1997. Various Defendants filed motions to dismiss the Complaint ("original motions to dismiss"). On November 14, 1997, while the original motions to dismiss were pending, Plaintiff filed a First Amended Complaint. The Court deemed moot the original motions to dismiss (See Minute Order dated November 20, 1997).

1/ On December 23, 1997, Plaintiff lodged with the Court a "[Proposed] Second Amended Complaint." The Proposed Second Amended Complaint does not cure the deficiencies found in the First Amended Complaint as discussed herein. Therefore, Plaintiff's Motion for Leave to File the [Proposed] Second Amended Complaint is denied.

On November 26, 1997, Defendants McKinley & Capeloto, J. Sheldon Capeloto, Elizabeth A. Lossing, Danielle D. Cyr, and Maxwell J. Jouanicot filed a Motion to Dismiss. Also on November 26, 1997, Defendants Judges David Doi and Susan E. Isacoff filed a Motion to Dismiss. On December 2, 1997, Defendants Prudential Property and Casualty Insurance Company, The Prudential Insurance Company of America, Berger, Kahn, Shafton, Moss Figler, Simon & Gladstone, Patrick E. Naughton, and Julie Beaton filed a Motion Dismiss. On December 9, 1997, Defendants Coast Federal Bank, Geoffrey Olsen, and Coast Savings Financial, Inc. filed a Motion to Dismiss (collectively, Defendants and "Motions to Dismiss").

On December 23, 1997, Plaintiff filed a "Notice of Non-Opposition, etc." to the Motions to Dismiss, and concurrently requested leave to file a [Proposed] Second Amended Complaint. Defendants oppose Plaintiff's request for leave to file a [Proposed] Second Amended Complaint (See oppositions filed December 31, 1997, January 5, 1998, and January 7, 1998). Plaintiff filed a "Reply to Defendants' Opposition, etc." on January 8, 1998. The

Court has taken these matters under submission without oral argument.

DISCUSSION

1. Judges David Doi and Susan E. Isacoff Possess Judicial Immunity.

The First Amended Complaint names Judges David Doi and Susan E. Isacoff as Defendants (First Amended Complaint "FAC" ¶¶ 22, 23). The judges are immune from suit in this case.

The scope of judicial immunity is broadly construed. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) ("Ashelman"). A judge is immune from suit unless: (1) the challenged action was "not taken in the judge's judicial capacity"; or (2) the challenged action was taken "in the complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. 9, 11 (1991). Neither

exception applies in the present case. [2]

An action is within a judge's "judicial capacity" if the action involves "a function normally performed by a judge." Id. A fraudulent or corrupt motive underlying performance of a judicial function does not destroy judicial immunity. Forrester v. White, 484 U.S. 219, 227 (1988) ("[a judicial act] does not become less judicial by virtue of an allegation of malice or corruption of motive"); Ashelman, 793 F.2d at 1078 (conspiracy between judge and lawyer "to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges").

The First Amended Complaint alleges Judge David Doi required Plaintiff to pay jury fees daily (FAC ¶¶ 33-40). Decisions regarding jury fees are functions normally performed by a judge. See Turlock Golf and Country Club v. Superior Ct. of Stanislaus

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[2] Plaintiff has not, and apparently cannot, allege the judges lacked jurisdiction to act in the underlying state case.

County, 240 Cal. App. 2d 693, 699, 50 Cal. Rptr. 70, 74 (1966); see also Cal. Civ. Proc. Code § 631; Cal. Rule of Ct. § 377. Accordingly, Judge Doi is entitled to judicial immunity. All claims against Judge Doi are dismissed without leave to amend.

The First Amended Complaint alleges Judge Isacoff: (1) informed Plaintiff that he would be treated "like an attorney" (FAC ¶ 49); (2) proceeded without seeing the proof of service for certain documents (FAC ¶¶ 57-58); (3) refused to enforce a subpoena duces tecum (FAC ¶¶ 59-60); (4) refused to take "judicial notice of certain laws and facts" (FAC ¶¶ 61-62); (5) refused to give Plaintiff time to review motions in limine (FAC ¶¶ 63-64); (6) eliminated Plaintiff's affirmative defenses (FAC ¶ 65); (7) informed Plaintiff that $500.00 was "a very generous offer" to settle (FAC ¶¶ 66-68); and (8) informed Plaintiff that he was wasting court time and instructed Plaintiff to enter settlement negotiations (FAC ¶¶ 69-70). Even assuming the allegations in the First Amended Complaint are true, the allegations implicate only functions normally performed by a judge. See generally Mireles, v. Waco, 502 U.S. 9, 11-13 (1991); Nelson v. Gaunt, 125 Cal. App. 3d 623, 638, 178 Cal. Rptr. 167,

175 (1981) ("When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys."); Cal. Rule of Ct. § 222 (trial court may require parties to attend mandatory settlement conferences). Accordingly, Judge Isacoff is entitled to judicial immunity. All claims against Judge Isacoff are dismissed without leave to amend.

2. The First Amended Complaint Fails to State a Claim Under Title 42 U.S.C. Section 1983.

Plaintiff's First Amended Complaint attempts to allege a violation of 42 U.S.C. section 1983 (FAC at 1). In order for a plaintiff to state a claim under section 1983, the plaintiff must allege, inter alia, the defendant was acting under color of state law at the time the complained of act was committed. Parrat v. Taylor, 451 U.S. 527, 535 (1981); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988). The actions of private individuals and entities not affiliated with state or municipal government generally do not involve state action. See Flagg Bros.,

Inc. v. Brooks, 436 U.S. 149, 156 (1978); Associates and Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 134-36 (9th Cir. 1971).

A private individual who conspires with state officials acts "under color of" state law. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (corrupt conspiracy between litigant and judge). The private conspirator acts "under color of" state law even if the involved state official is immune from suit. Id. at 28.

In the present case, all Defendants, except Defendant Judges Doi and Isacoff, are private individuals, not state actors. To the extent Plaintiff is attempting to bring these private Defendants within the ambit of a section 1983 claim by alleging the private Defendants conspired with state actors, Plaintiff has failed to state a claim (FAC ¶¶ 112, 114, 116, 118, 120, 122, 136 & 138). Plaintiff has failed to allege any facts regarding an alleged conspiracy between the private Defendants and state actors. Conclusory allegations are insufficient. See Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989); Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984) ("In conspiracy cases, a defendant must be informed of the

nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed."); Jones v. Community Dev. Agency, 733 F.2d 646, 649 (9th Cir. 1984); Ivey v. Board of Regents of Univ. of Alaska, 673 F. 2d 266, 268 (9th Cir. 1982); Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965), cert. denied, 382 U.S. 966 (1965).

Because Plaintiff has failed to allege state action sufficiently, he has failed to state a claim for a violation of 42 U.S.C. section 1983. Plaintiff's section 1983 claim is dismissed with leave to amend.

3. Plaintiff's Related Constitutional Claims Fail as a Matter of Law.

Plaintiff attempts to allege violations of the Thirteenth and Fourteenth Amendments (FAC ¶¶ 100-123, 136-139). Because Plaintiff has not alleged sufficiently a section 1983 claim, Plaintiff's constitutional claims also must be dismissed. See Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), cert.

denied, 506 U.S. 1081 (1993) ("Plaintiff has no cause of action directly under the United States Constitution, . . . a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. section 1983."); see also Golden Gate Hotel Assoc. V. City of San Francisco, 18 F.3d 1482, 1486-87 (9th Cir. 1994).

4. The First Amended Complaint Fails To State A Claim Under Title 42 U.S.C. 1981.

Plaintiff appears to attempt to allege a violation of 42 U.S.C. section 1981 (FAC at 1). Section 1981 "provide[s] a cause of action for deprivation of a contract right" based upon race. Carrero v. New York City Housing Authority, 890 F.2d 569, 575 (2nd Cir. 1989). The First Amended Complaint fails to allege Defendants deprived Plaintiff of the right to contract; to the contrary, the First Amended Complaint appears to allege Plaintiff desires to rescind a contract into which he entered (FAC ¶¶ 71, 82). Thus, Plaintiff's 42 U.S.C. section 1981 claim is dismissed with leave to amend.

5. The First Amended Complaint Fails To State a Claim Under Title 42 U.S.C. Section 1985 or 1986.

Plaintiff appears to attempt to allege violations of 42 U.S.C. sections 1985 and 1986 (FAC at 1). These statutes refer to a conspiracy intending to interfere with an individual's civil rights. 42 U.S.C. §§ 1985, 1986.

"To state a claim for conspiracy, a plaintiff must allege the agreement of each defendant to the operation of the conspiracy . . . . A complaint may be dismissed if it contains only conclusory, vague and general allegations of conspiracy." See Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1137 (7th Cir. 1987), cert. denied, 486 U.S. 1026 (1988) (internal citations omitted); Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984) ("In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed.").

As discussed above, the First Amended Complaint alleges no facts regarding a conspiracy. Thus, Plaintiff's section 1985 and 1986 claims are dismissed with leave to amend.

6. Fictitiously Named Defendants May Be Dismissed.

The First Amended Complaint names as Defendants "Does 1-50" (FAC ¶ 24). As a general rule, the use of fictitiously named defendants is disfavored in federal court. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). Unidentifiable doe defendants may be dismissed from the complaint. See id.; McConnell v. Marine Eng'rs Beneficial Ass'n, 526 F. Supp. 770, 774 (N.D. Cal. 1981).

7. The Court May Decline Supplemental Jurisdiction.

Plaintiff alleges various state law claims (FAC ¶¶ 124-33, 140-43). A federal court may decline supplemental jurisdiction and dismiss state law claims if no viable federal claims exists. See Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d

1303, 1309 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1367(c).

CONCLUSION

A complaint filed pro se may be dismissed without leave to amend where "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations omitted); see Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (dismissal with prejudice is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief"). It appears that dismissal of the entire action with prejudice may be appropriate. However, the Court will exercise its discretion to grant Plaintiff an opportunity to amend as to all defendants other than Judges Doi and Isacoff by filing a Third Amended Complaint. Plaintiff may not amend his claims as to Judges Doi or Isacoff. Plaintiff shall not attempt to add

additional defendants (or additional plaintiffs) without leave of Court. See Fed. R. Civ. P. 21.

IT IS ORDERED that the Clerk serve forthwith a copy of this Order on Plaintiff and counsel for Defendants.

DATED: Jan 12, 1998.

"s/Harry L. Hupp"
HARRY L. HUPP
UNITED STATES DISTRICT JUDGE

PRESENTED this 9th day of January, 1998 by:

"s/Charles F. Eick"
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE